Said Hashim bin Mohd Basri v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S–09–69 OF 1995

ABDUL KADIR SULAIMAN, ARIFIN ZAKARIA AND NIK HASHIM JJCA

15 DECEMBER 2005

Criminal Procedure — Jurisdiction of court — Federal Court — Whether Federal Court seized with jurisdiction to hear appeals arising from the exercise of the sessions' court original jurisdiction

Criminal Procedure — Jurisdiction of court — Federal Court — Appeal from decision of Court of Appeal in its appellate jurisdiction in respect of a criminal matter decided by the sessions court in its original jurisdiction — Whether jurisdiction conferred upon Federal Court to hear such appeal

Criminal Procedure — Stay of execution pending appeal — Appeal to Federal Court from decision of Court of Appeal in its appellate jurisdiction in respect of a criminal matter decided by the sessions court in its original jurisdiction — Stay of execution pending such appeal — Whether stay ought to be granted

The applicant was first convicted and sentenced to 18 months' imprisonment by the sessions court for an offence under s 409 of the Penal Code. He appealed to the High Court which only allowed his appeal against sentence and reduced his term of imprisonment to 12 month. The sentence was stayed pending further appeal to the Court of Appeal. On 21 February 2005, the applicant's appeal to the Court of Appeal was dismissed for, inter alia, the non-filing of a petition. The decision of the High Court was affirmed and the applicant was ordered to serve his sentence of 12 months' imprisonment forthwith. On 4 March 2005, the applicant applied to reinstate the appeal process and also for a stay of execution of the sentence. This application was dismissed on 21 March 2005. The applicant filed an appeal to the Federal Court on 1 April 2005. Thereafter, he filed an application to the Court of Appeal for a stay of execution pending the appeal to the Federal Court. At the hearing of the application, the deputy public prosecutor raised a preliminary objection on whether the applicant's appeal to the Federal Court was competent in the light of s 87 of the Court of Judicature Act 1964.

Held, dismissing the application:

(1) The instant application arose out of the decision of the Court of Appeal in respect of a criminal matter decided by the sessions court in its original jurisdiction. The involvement of the High Court in the instant case was in its appellate jurisdiction. The purported appeal pending before the Federal Court for which this application for a stay of execution of the sentence was made

involved a matter which was decided by the sessions court in the exercise of its original jurisdiction. However, in criminal matters, the appellate jurisdiction given by the Court of Judicature Act 1964 to the Federal Court is only confined to matters decided by the High Court in its original jurisdiction. In the instant case, s 87 of the Act was of no assistance to the applicant (see para 11).

(2) There were also no other provisions in the Act in respect of any criminal matter decided by the sessions court in its original jurisdiction which would confer jurisdiction upon the Federal Court to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction over the matter (see para 11).

(3) Since the instant application concerned a stay pending the disposal of the appeal in the Federal Court, the issue of a stay of execution pending the disposal of the appropriate appeal by the Federal Court over the decision of the Court of Appeal made on 21 March 2005 from the original decision of the sessions court would not arise. Hence, the preliminary objection by the respondent ought to sustain and the application ought to be dismissed (see para 12).

[Bahasa Malaysia summary

Pemohon pada mulanya telah disabitkan dan dijatuhkan hukuman penjara 18 bulan oleh mahkamah sesyen kerana kesalahan di bawah s 409 Kanun Keseksaan. Beliau telah merayu ke Mahkamah Tinggi yang hanya telah membenarkan rayuan beliau terhadap hukuman dan mengurangkan tempoh pemenjaraan beliau kepada 12 bulan. Hukuman tersebut telah digantung sementara menunggu rayuan seterusnya ke Mahkamah Rayuan. Pada 21 Februari 2005, rayon perayu ke Mahkamah Rayuan telah ditolak kerana, antara lain, tidak memfailkan petisyen. Keputusan Mahkamah Tinggi telah disahkan dan pemohon telah diperintahkan untuk menjalani hukuman penjara 12 bulan beliau. Pada 4 Mac 2005, pemohon telah memohon agar proses rayuan dikendalikan semula dan juga untuk satu penggantungan pelaksanaan hukuman tersebut. Permohonan ini telah ditolak pada 21 Mac 2005. Pemohon telah memfailkan satu rayuan ke Mahkamah Persekutuan pada 1 April 2005. Setelah itu, beliau telah memfailkan satu permohonan ke Mahkamah Rayuan untuk satu penggantungan pelaksanaan sementara menunggu rayuan ke Mahkamah Persekutuan. Semasa perbicaraan permohonan itu, timbalan pendakwa raya telah menimbulkan bantahan awal berhubung sama ada rayuan perayu ke Mahkamah Persekutuan adalah kompeten berdasarkan s 87 Akta Kehakiman Mahkamah 1964.]

Diputuskan, menolak permohonan tersebut:

(1) Permohonan semasa timbul daripada keputusan Mahkamah Rayuan berhubung perkara jenayah yang telah diputuskan oleh mahkamah sesyen dalam bidang kuasa asalnya. Penglibatan Mahkamah Tinggi dalam kes semasa adalah dalam bidang kuasa rayuannya. Rayuan yang dimaksudkan yang belum selesai di hadapan Mahkamah Persekutuan yang mana permohonan ini untuk satu penggantungan pelaksanaan hukuman dibuat melibatkan perkara yang

telah diputuskan oleh mahkamah sesyen dalam menggunakan bidang kuasa asalnya. Namun, dalam perkara jenayah, bidang kuasa rayuan yang diberikan olah Akta Kehakiman Mahkamah 1964 kepada Mahkamah Persekutuan hanya terbatas untuk perkara-perkara yang telah diputuskan oleh Mahkamah Tinggi dalam bidang kuasa asalnya. Dalam kes semasa, s 87 Akta tersebut tidak membantu pemohon (lihat perenggan 11).

(2) Tiada juga peruntukan lain dalam Akta tersebut berkaitan apa-apa perkara jenayah yang diputuskan oleh mahkamah sesyen dalam bidang kuasa asalnya yang memberikan bidang kuasa kepada Mahkamah Persekutuan untuk mendengar dan memutuskan apa-apa rayuan daripada keputusan Mahkamah Rayuan dalam bidang kuasa rayuannya berhubung perkara tersebut (lihat perenggan 11).

(3) Memandangkan permohonan semasa berkaitan penggantungan sementara menunggu selesai rayuan di Mahkamah Persekutuan, persoalan berhubung penggantungan pelaksanaan sementara menunggu selesai rayuan oleh Mahkamah Persekutuan berhubung keputusan Mahkamah Rayuan yang dibuat pada 21 Mac 2005 berdasarkan bidang kuasa asal mahkamah sesyen tidak timbul. Justeru itu, bantahan awal oleh responden patut dikekalkan dan permohonan patut ditolak (lihat perenggan 12).

Notes

For cases on the jurisdiction of the Federal Court, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2154–2158.

For cases on stay of execution pending appeal, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3829–3832.

Cases referred to

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (refd)

Legislation referred to

Court of Judicature Act 1964 ss 50(1), 87, 96
Penal Code s 409

Hamid bin Ismail (Hamid & Co) for the appellants.
Anthony Kevin Morais (Attorney General's Chambers) for the respondents.

Abdul Kadir Sulaiman JCA (delivering judgment of the court):

[1] By a notice of motion dated 15 April 2005 in encl (23a) which is supported by an affidavit of the applicant affirmed on 14 April 2005, the applicant prays for an order that the execution of the 12 months imprisonment which he was currently serving be stayed pending the disposal by the Federal Court of his notice of appeal against the decision of this court made on 21 March 2005. That decision dismissed an application by the applicant by notice of motion of 4 March 2005 which prays for an order to reinstate the appeal before the Court of Appeal which was dismissed

on 21 February 2005. The dismissal on 21 February 2005 was for the reason that there was no proper appeal before the court owing to the non-filing of the petition of appeal.

[2] On 9 May 2005, we dismissed the said motion of 15 April 2005 in encl (23a). We now provide our reasons for so doing. But before that, in order to properly appreciate the reasoning, we would briefly state the events leading to the various applications made by the applicant.

[3] Initially, the applicant was charged in the Sessions Court, Tawau, Sabah for criminal breach of trust, an offence punishable under s 409 of the Penal Code. At the conclusion of the trial, he was convicted and sentenced to 18 months imprisonment. Dissatisfied with the said decision, he appealed to the High Court, Tawau, Sabah against the said conviction and sentence. The High Court dismissed his appeal against conviction. However, his appeal against sentence was allowed to the extent that it was reduced from 18 months to 12 months imprisonment. The sentence was however, stayed pending further appeal to the Court of Appeal. The notice of appeal to the Court of Appeal was filed on 3d February 1995.

[4] That appeal before the Court of Appeal was fixed for hearing on 21 February 2005. On that day, Encik Sugumar Balakrishnan, the then counsel for the applicant made an oral application discharging himself as counsel representing the Applicant which application was allowed by the court. As to the appeal proper, due to the non-filing of a Petition, it was dismissed. The decision of the High Court was accordingly affirmed and the applicant was accordingly ordered to serve his 12 months sentence forthwith.

[5] Then by a notice of motion dated 4 March 2005 in encl (12a), the applicant through his new counsel, Encik Hamid Ismail, made an application for reinstatement of the appeal process and for stay of execution of the sentence imposed on the applicant pending the disposal of the appeal if the application for reinstatement is allowed. This application was heard on 21 March 2005 by the Court of Appeal and was again dismissed. So, on 1 April 2005, the applicant filed an appeal with the Federal Court against the dismissal of the application by the Court of Appeal. In the meanwhile, the present motion in encl (32a) was filed.

[6] At the commencement of the hearing of the application on 9 May 2005, the learned deputy for the respondent raised a preliminary objection on the issue of incompetency of the applicant's appeal to the Federal Court in the first place in the light of the provisions of s 87 of the Court of Judicature Act 1964. In the circumstances, this motion of the applicant ought to be dismissed in limine as the prayer is for a stay pending the purported appeal to the Federal Court.

[7] In reply, the learned counsel for the Applicant merely referred us to two case authorities to counter the argument of the learned deputy. One is *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 where at p 69 Abdul Hamid Mohamad JCA (as he then was) said:

I do not think that a court hearing an application for a stay of execution should make a finding that the appeal is doomed to failure or even that there are no merits in the appeal. The reasons are given by Shanker J (as he then was in) in *Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1)* [1997] 2 MLJ 1 at p 3:

> The grounds of judgment of the trial judge are not before us and it would be premature for us to say that this appeal is without any prospect of success.

[8] The other is *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 where one of the issues to be determined by the Federal Court was whether it has jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal which did not originate from the High Court, save and except from any judgment, order or decision which is whether the Court of Appeal should or should not grant leave to appeal to it.

[9] It is interesting to note that the two cases cited by the learned counsel are in respect of civil matters but the matter before us is a criminal one. In as far as the jurisdiction of the Federal Court to hear and determine any appeal from a decision of the Court of Appeal in its appellate capacity in respect of any criminal matter is governed by s 87 of the Act. But in respect of its appellate jurisdiction in respect of any civil cause or matter, it is governed by s 96 of the Act. Since, we are here dealing with a criminal matter, the issue of s 96 of the Act would not at all arise. In the circumstances, the two case authorities cited by the learned counsel for the applicant, are of no assistance and therefore, irrelevant. Further, our reason for dismissing the motion is not on a finding that the appeal before the Federal Court is doomed to failure or even that there are no merits in the appeal.

[10] Reverting to s 87 of the Act which governs criminal matters such as the nature of the motion before us now, sub-s (1) thereof states as follows:

> (1) The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter *decided by the High Court in its original jurisdiction* subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal. (Emphasis added.).

[11] It cannot be disputed that this motion arose out of the decision of the Court of Appeal in respect of a criminal matter decided by the sessions court in its original jurisdiction. The involvement of the High Court here was in its appellate jurisdiction. The purported appeal pending before the Federal Court for which reason this motion for a stay of execution of the sentence was made before us must necessarily involve the matter which was decided by the sessions court in the exercise of its original jurisdiction. However, in criminal matters, the appellate jurisdiction given by the Act to the Federal Court is only confined to one decided by the High Court in its original jurisdiction. Hence, s 87 of the Act is of no assistance to the applicant. We cannot find any other provisions in the Act in respect of any criminal matter decided by the sessions court in its original jurisdiction which would confer the jurisdiction in the Federal Court to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction over the matter. Looking

at s 50(1) of the Act, it only concerns the exercise of the appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court. But the jurisdiction in s 50 is given only to the Court of Appeal. Subsection (1) thereof states as follows:

> 50 (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —
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> (a) in the exercise of its original jurisdiction; and
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> (b) in the exercise of its appellate or revisionary jurisdiction *in respect of any criminal matter decided by the Sessions Court*. (Emphasis added.)

[12] Since this motion in encl (23a) concerns a stay pending the disposal of the appeal in the Federal Court, and in the view that we take on the interpretation of the various provisions of the Act, the issue of a stay of execution pending the disposal of the appropriate appeal by the Federal Court over the decision of the Court of Appeal made on 21 March 2005 from the original decision of the sessions court would not arise. Hence, the preliminary objection by the respondent ought to sustain and therefore, the application by way of this motion in encl (23a) ought to be dismissed. We accordingly made the order dismissing the motion so filed.

Application dismissed.

Reported by John Paul Simon